IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

Court of Appeal Case No.
CA/HCC/ 0062/2021

High Court of Embilipitiya
Case No. HCE/165/2019

Karalahinge Janaka Saman Kumara alias Janaka alias Hin Malli

ACCUSED-APPELLANT

Vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Sandamal Rajapaksha for the Appellant.**
Azard Navavi, SDSG for the Respondent.

ARGUED ON : **24/07/2023**

DECIDED ON : **01/11/2023**

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JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted by the Attorney General for following offences:

1. For committing an offence of Grave Sexual Abuse on Kavindu Chinthaka Congreve between the period of 01.01.2016 and 31.01.2016 an offence punishable under Section 365 B (2) (b) of the Penal Code.
2. During the same time period kidnapping the said child from the lawfull guardianship an offence punishable under Section 354 of the Penal Code.
3. During the same time period committing an offence of Grave Sexual Abuse on Kavindu Chinthaka Congreve an offence punishable under Section 365 B (2) (b) of the Penal Code.

The trial commenced on 20/08/2020. After leading all necessary witnesses, the prosecution closed the case. The Learned High Court Judge had called for the defence and the Appellant opted to testify under oaths.

The Learned High Court Judge after considering the evidence presented by both parties, convicted the Appellant for the 1st Count and sentenced the Appellant to 11 years of rigorous imprisonment and imposed a fine of Rs.20000/- subject to a default sentence of 04 months simple imprisonment. In addition, a compensation of Rs.100000/- was ordered with a default sentence of 06 months simple imprisonment.

Further, the Appellant was acquitted from 2nd and 3rd Counts by the Court.

Being aggrieved by the aforesaid conviction and the sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. During the trial he was connected via zoom from the prison.

Even though on perusal of the Written Submissions of the Appellant, it appears no specific grounds of appeal had been urged. But at the hearing following Grounds of Appeal are raised on behalf of the Appellant.

1. Whether the Learned High Court Judge considered the credibility of the evidence of the victim properly.
2. Whether the Learned High Court Judge considered the medical evidence and the evidence of victim's mother properly.
3. Whether prosecution led evidence as to how the complaint was instituted.
4. Whether the Learned High Court Judge considered the evidence of the Appellant properly.

The Facts of this case *albeit* briefly are as follows:

According to PW1, the victim of this case, he was about 11 years old when he had undergone this ordeal. The Appellant, who is well known him and his family, had taken the victim to his sister's house on the pretext of having to feed the fish. The victim was taken in a push-bicycle and having arrived at the house of the Appellant's sister's house, he was taken inside. Thereafter, the victim was taken into a room and having got the victim to lie on the bed, and removed his clothes, the Appellant committed a sexual act between his thighs (Intra-crural).

After the act, he was brought back and dropped him closed to his house. Before the Appellant departed, he had threatened the witness not to divulge this incident to anybody. Due to fear he had not divulged this to his mother, but it had come to light in the school and then he was questioned by police, where he disclosed the incident.

PW2, the mother of victim testified that she came to know about the incident from school and thereafter made a statement to the police.

PW3, JMO who examined the victim on 03.02.2016 had opined that even though no injuries observed on the victim's body he could not exclude intra-crural act committed on the victim.

According to PW7, the police officer who had conducted the investigation stated that the investigation was commenced upon receiving a telephone message through children assistance toll free No.1929. Thereafter, he had recorded the statement from the victim and arrested the Appellant.

The Appellant in his evidence admitted that he had taken the victim on 31.01.2016 to his sister's house to feed fish but denied that he committed any sexual abuse on the child.

In the first ground of Appeal the Appellant contends that whether the Learned High Court Judge considered the credibility of the evidence of the victim properly.

In a case of this nature, the testimonial trustworthiness and credibility of PW1, mainly probability should be assessed with utmost care and caution by the trial judge. The learned Trial Judge has to satisfy and accept the evidence of a child witness after assessing his competence and credibility as a witness. Hence, before analysing the grounds of appeal advanced in this case, I consider it of utmost importance that the following authorities from other jurisdictions on the topic be appraised.

It was recognized in England as early as 1778 that children could be competent witnesses in criminal trials.

In **R v. Brasier**168 Eng. Rep.202 [1779] the court held:

> "…….*that an infant, though underage of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath… for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take oath, their testimony cannot be received ….".*

In **Ratansinh Dalsukhbhai Nayak v. State of Gujarat** [2004] 1 SCC 64 the court held that:

> *"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaked and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness".*

In **Ranjeet Kumar Ram v. State of Bihar** [2015] SCC Online SC 500 the court held that:

> *"Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one".*

E.R.S.R Coomaraswamy in his "Law of Evidence" Volume 2 Book 2 at page 658 has stated referring to child witness;

> "There is no requirement in English law, that the sworn evidence of a child witness needs to be corroborated as a matter of law. But the jury should be warned, not to look for corroboration, but of the risks involved in acting on the sole evidence of young girls and boys, though they may do so if convinced of the truth of such evidence.……This requirement is based on the susceptibility of children to the influence of others and to the surrender to their imaginations".
>
> At page 659 it states "As regards the sworn testimony of children, there is no requirement as in England to warn of the risk involved in acting on their sole testimony, though it may desirable to issue such a warning, though the failure to do so will generally not affect the conviction".

The victim was 15 years old when he gave evidence before the court. The Learned High Court Judge in her judgment very correctly and comprehensively considered the evidence given by the victim.

The relevant portion is re-produced below:

Page 210 of the brief.

මෙම නඩුවේ චින්දිත තැනැත්තා ඉතා පැහැදිලිව සාක්ෂි දෙමින් චූදිත 2016 ජනවාරි 01 දිනත් 2016 ජනවාරි 31 දිනත් අතර කාලය තුළදී තමාව ඔහුගේ සහෝදරියගේ නිවසට රැගෙන ගොස් තමාගේ දෙකලවා අතරේ ඔහුගේ පරුෂ ලිංගය තබා බරපතල ලිංගික අපයෝජනයක් සිදුකල බවට ඉදිරිපත් කළ කරුණු පිළිගැනීමේ හැකියාවක් ඇත. තවද, සවස් වරුවක මේ ආකාරයට කිසිවෙකුත් නැති නිවසකට අවුරුදු 11ක දරුවෙකු රැගෙන ගොස් දරුවාගේ ඇඳුම් ඉවත් කර තම පුරුෂ ලිංගය දරුවාගේ දෙකලවා අතර තැබීමක් සිදුකරනුයේ ලිංගික තෘප්තියක් ලබාගැනීමේ ඒකායන අරමුණින් බව පැහැදිලිය. ඒ අනුව මෙම නඩුවේ චූදිත වයස අවුරුදු 16 කට අඩු චින්දිත තැනැත්තෙකු වූ කවිදු චින්තක දරුවාට බරපතල ලිංගික අපයෝජනයක් සිදුකර ඇති බවට පැමිණිල්ල විසින් සාධාරණ සැකයෙන් තොරව ඔප්පු කර ඇති බවට මා තීරණය කරමින් චූදිත ඔහුට එරෙහිව ගොනුකර ඇති පළමු චෝදනාවට වැරදිකරු කරමි.

Further the Learned High Court Judge had considered contradictions marked by the defence, and she had given plausible reasons as to why she disregards those contradictions. The relevant portions of the judgment is re-produced below:

Pages 202-203 of the brief.

මෙම නඩුවේ දරුවාගේ සාක්ෂියේ ඇති පරස්පරතා හා ඌනතා කිහිපයක් ආශ්‍රයෙන් දරුවාගේ සාක්ෂිය අධිකරණයට පිළිගත හැකි සාක්ෂියක් නොවන බවට පත්වන බව විත්තිය ස්වකීය සැලකිරීම් වලදී අවධානය යොමු කර ඇත. ඒ අතුරෙන් වි.01 ලෙසට සලකුණු කර ඉදිරිපත් කළ තමන් නිවසින් යන විට නිවසේ අම්මා සහ අක්කා සිටි බවට පොලිසියට කියා තිබුණ ද නඩු විභාගයේදී තමා නිවසින් යන විට කිසිවෙකු නිවසේ නොසිටි බවට අධිකරණයට කියා සිටීම පරස්පරතාවයක් බවත්, වි.02 ලෙසට සිද්ධිය සිදු වූ දිනය සෙනසුරාදා දිනයක් හෝ ඉස්කෝලේ නිවාඩු දිනයක් ලෙසට පොලිසියට කියා ඇති නමුත් නඩු විභාගයේදී තමා පාසල් ගොස් ආ පසුව මෙවැනි සිද්ධියක් සිදුවූ බවට පවසා තිබීම පරස්පරතාවයත්, වි.03 ලෙසට අයියා ඇඳ සිටියේ සරමක් බවට පොලිසියට කියා තිබුණ නමුත් නඩු විභාගයේදී චූදිත ඒදින දිග කලිසමක් ඇඳ සිටි බවට පවසා තිබීම පරස්පරතාවයත්, වි. 04 ලෙසට පොලිසියට කර ඇති ප්‍රකාශයේ මම ටැප් එක ලඟට ගොස් සෝදා ගත්තා ලෙසට කියා ඇති නමුත් නඩු විභාගයේ දී ඇඟ පිසදාගෙන ගිය බවට කියා තිබීමේ පරස්පරතාවයත් විශේෂයෙන් අවධානයට යොමු කර ඇත.

මෙම සිද්ධිය සිදුවී ඇත්තේ දරුවා සාක්ෂි දෙන දිනයට වසර හතරකට පෙරාතුවය. දරුවා සාක්ෂි දෙන විට ද අවුරුදු 15 ක වියැති බාලවයස්කාර දරුවෙකු වූ අතර, ඔහු සිද්ධියට මුහුණදී තිබුණේ අවුරුදු 11 ක වයසේදීය. ඒ අනුව මීට අවුරුදු හතරකට පෙරාතුව තමා අවුරුදු 11 ක් වැනි බාලවියේ දරුවෙකුව සිටින අවස්ථාවේදී තමා මුහුණාදුන් සිද්ධියක දී අදාළ පරිවේෂණයන් පිළිබඳව තමාගේ මතකයේ ඉතා පැහැදිලිව ගැබ්ව නොතිබියාද විය හැක.

Justice Thakkar in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** 1983 AIR SC 753 stated:

> *“By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen”.*

Hence, the learned High Court Judge has very correctly held that the contradictions which do not go to the root of the case has no bearing on the outcome of main case.

Learned High Court Judge had considered the evidence of the victim fairly and squarely by analysing the demeanour of the witness adequately to decide this case. Hence, no substantial rights of the Appellant had been prejudiced. Therefore, this ground has no merit.

In the second ground of appeal, the Appellant contents that whether the Learned High Court Judge considered the medical evidence and the evidence of victim's mother properly.

In her judgment, the Learned High Court Judge had adequately considered the medical evidence to arrive at her decision. Hence, it is incorrect to state that the Learned High Court Judge had not considered the medical evidence properly. The relevant portion is re-produced below:

Page 196 of the brief.

මෙම නඩුවේ අධිකරණ වෛද්‍ය නිලධාරී තැන සාක්ෂි දෙමින් පවසා ඇත්තේ දරුවා අධිකරණ වෛද්‍ය පරීක්ෂණයකට ලක් කලද ඔහුගේ සිරුරේ සිද්ධියට අදාළ බාහිර තුවාල කිසිවක් දක්නට නොලැබුණු බවයි. එහෙත් දරුවා විස්තර කර ඇති ආකාරයේ ක්‍රියාවක් බාහිර තුවාල සිදුවීමකින් තොරව වූවද සිදුවීමේ හැකියාවක් ඇති බව ඔහු සඳහන් කර ඇත. එකී අධිකරණ වෛද්‍ය නිලධාරීවරයාගේ සාක්ෂියට අනුව බාහිර තුවාල නොතිබුණද මෙවැනි සිද්ධියක් සිදුවූ බව බැහැර කිරීමේ හැකියවක් නොමැති බවත් සඳහන් කළ යුතුය.

Next, the Learned High Court Judge had very correctly stated that the victim's evidence is not corroborated by mother's evidence, as the victim's mother only came to about the incident when she was called to the police. The relevant portion is re-produced below:

Page 196 of the brief.

මෙම සිද්ධිය තහවුරු කිරීම සඳහා චින්දිත දරුවාගේ මව සාක්ෂියට කැඳවූව ද ඇය සඳහන් කර ඇත්තේ තමා මෙම සිද්ධිය පිළිබඳව කිසිවක් නොදන්නා බවත්, තමා ඒ පිළිබඳව දැනගත්තේ

පොලිසිය සහ පාසලේ අය නිවසට පැමිණීමෙන් අනතුරුව බවත් ය. ඒ අනුව දරුවාගේ මවගේ සාක්ෂියෙන් දරුවාට ලිංගික අතවරයක් වූ බව තහවුරු වීම සඳහා කිසිදු තහවුරුවීමේ කරුණක් අනාවරණය නොවන බව සඳහන් කළ යුතුය.

Therefore, the matters raised in second ground has no merit at all.

In the third ground of appeal, the Appellant contends that whether the prosecution led evidence as to how the complaint was instituted.

The prosecution had led evidence that the victim's mother only came to know the incident from the police. The victim in his evidence said that he has not informed the incident to his mother due to fear engulfed over the Appellant. This has been very well considered by the Learned High Court Judge in her judgment. The relevant portion is re-produced below:

Page 200 of the brief.

විත්දිත දරුවා ස්වකීය සාක්ෂියේදී පවසා ඇත්තේ සිද්ධිය සිදුවීමෙන් අනතුරුව චූදිත තමාට තර්ජනය කිරීමක් සිදුකල බවයි. (බලන්න 2020.08.20 සාක්ෂියේ පිටු අංක 10)

ප්‍ර : ඊට පස්සේ මොකද වුණේ ?

උ : ඒ අයියා කිව්වා අම්මාට කිව්වොත් එහෙම මරණවා කියලා.

එමෙන්ම චූදිත තමාගේ දෙකලවා අතරේ ඔහුගේ පුරුෂ ලිංගය තැබීමේ සිද්ධිය සිදුකිරීමෙන් අනතුරුව නිවසට යන අතරතුරදී මේ පිළිබඳව තමාගේ මවට නොකියන ලෙසටත්, කිව්වොත් මරණ බවටත් පැවසූ බව දරුවා සාක්ෂි දෙමින් පවසා ඇත.

(බලන්න 2020.08.20 මධ්‍යහ්න 12.00 ට සාක්ෂියේ පිටු අංක 05)

ප්‍ර : කොහොමද කවිදු ගෙරද ආවේ?

උ : බයිසිකලයෙන්.

ප්‍ර : කාගේ බයිසිකලයෙන් ද?

උ : ඒ අයියගේ බයිසිකලයෙන් එනගමන් කිව්වා අම්මාට කියන්න එපා මරණවා කියලා.

Further, how the incident was reported has been very correctly considered in the judgement by the Learned High Court Judge. In this case, the incident has directly reported to police under toll free children help desk No.1929.The investigation was sparked off upon receiving this information. This too has been correctly considered by the Learned High Court in her judgment. The relevant portion is re-produced below:

Page 189 of the brief.

ඉන් අනතුරුව සාක්ෂි ලබාදී ඇත්තේ ප්‍රධාන පොලිස් පරීක්ෂක ආරීවංශ නිලධාරියායි. ඔහු සාක්ෂි දෙමින් පවසා ඇත්තේ තමන් සෙවනගල පොලිස් ස්ථානයේ සේවය කරමින් සිටි අවස්ථාවේදී 1929 ළමා උපකාරක සේවය මඟින් දුරකථන ඇමතුමක් ලබාදෙමින් මෙම සිද්ධියට අදාළ ලිංගික අපයෝජනය පිළිබඳ තොරතුරු පොලිස් ස්ථානයට ලබාදුන් බවයි. ඉන්පසුව තමන් සිද්ධිය සිදුවූවා යැයි සඳහන් දරුවා සිටින පාසලට ප්‍රකාශ ලබාගැනීම සඳහා නිලධාරීන් යොමු කළ බවද පවසා ඇත.

This appeal ground too has no merit as there is no discrepancy to be noted regarding the reporting of the incident to relevant authority.

In the final ground of appeal, the Appellant contends that whether the Learned High Court Judge considered the evidence of the Appellant properly.

The Learned High Court Judge had properly considered the evidence given by the Appellant in her judgement. The Appellant had not denied that he took the victim to his sister's place to feed the fish. This position had been considered along with the defence taken by the Appellant. The relevant portion is re-produced below:

Page 190 of the brief.

පැමිණිල්ලේ සාක්ෂි අවසන් වීමෙන් අනතුරුව චූදිතට විත්තියේ නඩුව කැඳවීමට ඇති අයිතිවාසිකම් පහදා දීමෙන් අනතුරුව චූදිත සාක්ෂි ලබාදීමක් කර ඇත. ඔහු සාක්ෂි ලබාදෙමින් පවසා ඇත්තේ, තමන් කවිදු චින්තක නැමැති වින්දිත දරුවාව හොඳින් හඳුනන බවයි. තමාගේ නංගිගේ දුවද කවිදු චින්තක දරුවා ඉගෙන ගන්නා පාසලටම යන බවත්, නංගිගේ දරුවාගේ මාර්ගයෙන් තමන් කවිදු චින්තකට ලිංගික අතවරයක් සිදුකල බවට පාසලෙන් ලැබුණු තොරතුරක් පිළිබඳව තමන්ගේ

නංගි තමාට දැනුම් දුන් බවත් හෙතෙම පවසා ඇත. එහෙත් එවැනි සිද්ධියක් තමා සිදුකලා යන කාරණය චූදිත ප්‍රතික්ෂේප ඇත. කෙසේවෙතත් කවිදු චින්තක යන අයව සහෝදරියගේ නිවසට මාළු කෑම දැමීම සඳහා රැගෙන ආ ගිය බව ඔහු පිළිගෙන ඇත.

Due to aforesaid reasons, the Appellant is not successful under this ground of appeal as well.

In this case, the victim had given firm evidence as to the atrocities committed on him by the Appellant. Even though the incident had happened when the victim was at a tender age, he had given evidence without any major contradictions.

Considering the evidence led in this case, I conclude that this is not an appropriate case in which to interfere with the judgement delivered by the Learned High Court Judge on 04/08/2021 against the Appellant. I therefore, dismiss the appeal.

The Registrar of this Court is directed to send this judgment to the High Court of Embilipitiya along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

JUDGE OF THE COURT OF APPEAL